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CPLR 308(3): Court Warns Plaintiffs About "Sewer Service"

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limitations in conversion actions, since in many such actions there is necessarily present an affirmative act of concealment on the defendant's part which would give rise to equitable estoppel. It must be pointed out, however, that the plaintiff must not be guilty of negligence in failing to discover his cause of action, since this will vitiate the plea of equitable estoppel.

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 302(a)(1): May be applicable to non-commercial transactions of business.

There seems to be a conflict as to whether CPLR 302(a)(1) is applicable to non-commercial as well as to commercial transactions of business. In *Willis v. Willis*,[6] the supreme court, New York County, held that a separation agreement entered into in New York was not a "transaction of business" within the meaning of CPLR 302(a)(1). The court said that this section encompassed only "commercial" transactions.[7]

However, the supreme court, Nassau County, in *Todd v. Todd*,[8] while holding service under CPLR 308 invalid, nevertheless noted that there "may well be a basis for maintaining the action in New York, for the separation agreement was apparently entered into in New York. . . ." [9]

To resolve this conflict, a clarification by the Court of Appeals is needed. In view of the recent amendment to CPLR 302(a)(3) expanding jurisdiction in the area of tortious activity, it would appear that the legislature intended CPLR 302 to approach the constitutional limit. Therefore, it would seem most likely that the Court of Appeals will eventually construe "transaction of business" to include both commercial and non-commercial transactions. By so doing, the New York courts will be given as broad a jurisdiction as is possible under the present terms of CPLR 302(a)(1).

CPLR 308(3): Court warns plaintiffs about "sewer service."

In *Todd v. Todd*,[10] the supreme court has warned plaintiffs to exercise care in their choice of process servers. In that case, the court vacated substituted service and dismissed the complaint for lack of jurisdiction, since it was conclusively demonstrated that

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[6] 42 Misc. 2d 473, 248 N.Y.S.2d 260 (Sup. Ct. N.Y. County 1964).
[7] *Id.* at 475, 248 N.Y.S.2d at 262.
[8] 51 Misc. 2d 94, 272 N.Y.S.2d 455 (Sup. Ct. Nassau County 1966).
[9] *Id.* at 96, 272 N.Y.S.2d at 456.
[10] 51 Misc. 2d 94, 272 N.Y.S.2d 455 (Sup. Ct. Nassau County 1966).

the defendant did not reside at the address at the time that the plaintiff's process server swore he made substituted service. The court also refused plaintiff's application for a nunc pro tunc order pursuant to CPLR 308(4), stating that even though the plaintiff had no knowledge of the process server's perjury, this did not excuse the wholly unauthorized act of "nailing and mailing" the summons and complaint to a place where the defendant did not in fact reside. The court went on to stress its strong disapproval of this practice:

> [P]rocess servers should be discouraged from *sewer service*, and attorneys from employing process servers who cannot be trusted to perform the acts they swear they do by refusing to accord any significance to acts performed by them without the factual basis which the law requires.[11]

The practitioner would be wise to heed the court's warning in view of the fact that should service be subsequently vacated, the statute of limitations may have expired.

CPLR 308(3): Substituted service vacated.

In *Todd v. Todd*,[12] substituted service under CPLR 308(3) was vacated where it was conclusively shown that defendant did not reside at the address where the process server swore service had been made.

The court, however, noted that the plaintiff might be able to seek authorization to examine defendant's present attorney concerning defendant's address. Then, if the defendant's address could not be obtained in this fashion, the court indicated that plaintiff would have a basis for a 308(4) order authorizing service on the attorney, "for there clearly is contact between defendant and his attorney and service on the attorney will conform to the requirements of due process."[13]

This would seem to be in accord with *Winterstein v. Pollard*,[14] wherein the court did not allow substituted service under 308(4) on the defendant's insurer since there was no showing of an actual contact between the defendant and the insurer. The court in *Winterstein* stated that "it cannot be said that notice to the insurer is reasonably calculated to give notice to the defendant." [15]

In the present case, there would seem to be three possibilities of service: (1) if the plaintiff fails to secure an examination of

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[11] *Id.* at 95, 272 N.Y.S.2d at 456. (Emphasis added.)
[12] 51 Misc. 2d 94, 272 N.Y.S.2d 455 (Sup. Ct. Nassau County 1966).
[13] *Id.* at 96, 272 N.Y.S.2d at 456.
[14] 50 Misc. 2d 354, 270 N.Y.S.2d 525 (Sup. Ct. Nassau County 1966).
[15] *Id.* at 355, 270 N.Y.S.2d at 527.